

THE HIGH COURT

[2022] IEHC 108
[Record No. 2018/ 2345 P]

BETWEEN

DANIEL HARTY

PLAINTIFF

-AND-

MARY NESTOR

-AND-

**THE MOTOR INSURERS' BUREAU OF IRELAND (MIBI)
DEFENDANTS**

Judgment of Mr. Justice Barr delivered extempore on 17th February, 2022.

Introduction.

1. This action arises out of a road traffic accident that occurred on 14th January, 2017. On that date the plaintiff was travelling in a car, which was being driven by the first named defendant, who was a neighbour of the plaintiff. The plaintiff was sitting in the front passenger seat. He was wearing a seatbelt. As they were going around a bend, an oncoming car came around the bend at speed and crossed onto their side of the road, colliding into the vehicle in which the plaintiff was travelling, striking a severe glancing blow to the driver's side of the vehicle. The offending vehicle did not stop, but carried on in the direction that it was going. The driver of that vehicle remains untraced; hence the involvement of the second named defendant.
2. While the occurrence of the accident and the liability for causation of that accident are not in dispute between the parties, the second named defendant has made the case that the plaintiff has been untruthful in relation to the information which he gave to both his own doctor and to various doctors whom he saw at the behest of the second defendant. In essence, the second defendant makes the case that the plaintiff, who had been involved in a prior accident on 27th May, 2008, deliberately understated the level of injuries that he had sustained in that accident, when describing his condition prior to the occurrence of the accident the subject matter of these proceedings.
3. The second defendant went further and submitted that the plaintiff had told deliberate lies to various doctors whom he had seen in the course of this litigation and had done so in a deliberate attempt to get them to give false and misleading evidence on his behalf. It was submitted that in the circumstances the case came within the provisions of section 26 of the Civil Liability and Courts Act 2004 and that the court should therefore dismiss the plaintiff's action against the defendants.
4. Thus, the essential question for the court in this case is whether the actions of the plaintiff have been sufficient to bring the case within s. 26 of the 2004 Act.

Summary of the evidence.

5. The plaintiff was involved in an RTA on 27th May, 2008. On that occasion, he was travelling as a passenger in a vehicle driven by his nephew. On approaching a zebra crossing, the car in front stopped to allow a cyclist to pass across the zebra crossing and the car in which the plaintiff was travelling, collided into the rear of that vehicle. As a

result of that collision, it was alleged by the plaintiff that he had suffered neck and back injuries. He instituted proceedings against his nephew. The MIBI were also a defendant to that action.

6. When that action came on for hearing before the High Court in Ennis in June 2016, the plaintiff withdrew his action. In cross examination in the current action, it was put to the plaintiff that he had withdrawn his previous proceedings because it had been intimated to him that the defendants were in a position to lead evidence from an undercover Garda to the effect that that accident had been a setup. The plaintiff denied that that was the reason why he withdrew his action. He stated that he had done so on the advice of his legal team.
7. In the course of cross examination, it was put to the plaintiff that he had given false and misleading evidence to this court, when he had stated in his evidence in chief, that the neck and back injuries arising out of the first accident in May 2008, had lasted for in or about six months. It was put to him that that was inconsistent with the records from his GP, which had been furnished in the course of the current proceedings, wherein it was noted that due to ongoing back pain, his GP had referred him to a Dr. Conroy in the Pain Clinic in St John's Hospital in May 2014 and again in 2015. It was further put to the plaintiff that his evidence in chief was inconsistent with what he had told Mr. Michael Gilmore, consultant orthopaedic surgeon, whom he had seen on 15th February, 2016 in relation to his first accident, when he had told the doctor that his back was "not so bad now", but that he had a few weeks prior to that experienced his back locking. He also stated that he got occasional pins and needles in the left foot. It was put to the plaintiff that that evidence from his own doctors was inconsistent with the evidence that he had given to the court at the hearing of this action.
8. It was further put to the plaintiff that he had given misleading information to the only doctor who had given evidence on his behalf in the present action. He had seen Dr. Aideen Henry, who had been retained by his solicitor to furnish a medicolegal report on behalf of the plaintiff. When he had seen her on 27th February, 2017, he had told her that he had been in an accident in 2008 in which he had hurt his lower back. He told her that he had made a full recovery after that and that he had no other medical issues. It was put to the plaintiff that that was false and misleading, given the content of the GP records in relation to his referral to the pain clinic in respect of ongoing back pain and also having regard to what he had told Mr. Gilmore at the examination in February 2016. In addition, it was put to the plaintiff that he had deliberately withheld making any mention of an injury to his neck in the accident in 2008; nor had he mentioned an incident of acute neck pain, for which he had attended with his GP on 20th January, 2015.
9. It was put to the plaintiff that he had been untruthful when he had been examined by Mr. Cormac Tansey on behalf of PIAB in relation to the second accident, when he had seen him on 17th October, 2017. In relation to his medical history, the plaintiff had told the doctor that he had been involved in a road traffic accident about nine years previously, in which he had sustained injuries to his lower back. He stated that he had had symptoms

"for a few months" after that accident. He told the doctor that that accident did not result in litigation or a personal injuries claim. It was put to the plaintiff that he had been misleading in failing to make any mention of the neck injury arising out of the 2008 accident and had been deliberately untruthful, when he had told the doctor that there had been no litigation or claim made arising out of that accident.

10. The plaintiff had seen Dr. Brian Spillane on behalf of the defendant on 24th May, 2018, at which time he had told the doctor that he had been involved in a road traffic accident more than 10 years previously. He had sustained a low back injury. He told the doctor that that had recovered fully within 3 to 4 years and that he had been fine before the accident the subject matter of these proceedings. He stated that he had no past history of any neck complaints. It was put to the plaintiff that having regard to the fact that he had injured his neck in the 2008 accident, that this history as given to the doctor, had been untruthful. Furthermore, insofar as he had said that he was fine before the accident, that too had been untruthful, having regard to the fact that he had been given an appointment to be seen at the Pain Clinic on 14th November, 2016, some two months prior to the second accident.
11. In cross examination of Dr. Henry, she accepted that she had been retained by the plaintiff's solicitor to furnish a report. She had not received any referral letter from the plaintiff's GP, nor had she had sight of the GP records.
12. She further accepted that in reaching her opinion that the degenerative changes which had been disclosed on MRI scans of the plaintiff's neck and lower back, which had been asymptomatic prior to the second accident and therefore in her opinion had been rendered symptomatic as a result of that accident, that that was based on what she had been told by the plaintiff to the effect that he had hurt his lower back in the 2008 accident, but that he had made a full recovery after that and that he had no other medical issues. She accepted that in reaching a diagnosis and a prognosis for the future, she was very much reliant upon what the patient told her in relation to their pre-accident medical state.
13. Dr. Henry accepted that when she had stated in her final medical report that the plaintiff had degenerative disc disease of the cervical spine which was asymptomatic prior to the accident, which the second accident had made symptomatic, as well as having radicular type left arm pain, that would not appear to be accurate, having regard to the information contained in the report from Mr. Gilmore and in the GP records, neither of which had been available to her when giving her opinion and prognosis.
14. It is only fair to point out that in answering these issues, the plaintiff, who has been unemployed for a very considerable period of time, stated that he had never tried to mislead any of the doctors. He stated that he had answered all questions that had been asked of him to the best of his ability.

Analysis of the Evidence.

15. The court has carefully analysed the medical records furnished by the plaintiff's GP. These cover the period commencing on 13th March, 2012 to 8th December, 2016. During that period the plaintiff consulted with his GP on a wide range of matters including symptoms in relation to dysuria and for cardiological issues. In these records, there is in fact only one reference to neck pain. That is an entry which appears to have been made by nurse Clifford on 20th January, 2015 which reads: "acute neck pain, not referred, no injury, reduced flexion and rotation to the left side, no neuro symptoms, normal power and reflexes upper limb. PX diclac and diazepam. If not settling to return."
16. Thus, it would appear that on only one occasion in January 2015, which was some seven years after the first accident, the plaintiff had one attendance with his GP complaining of an episode of acute neck strain. For this he was prescribed analgesic medication and told to return if it did not settle. The court does not regard this entry as being indicative of any long-term neck problems arising out of the accident that occurred in 2008.
17. When the plaintiff attended with Mr. Gilmore in February 2016, he told him that his neck was "okay now". Thus, the court is satisfied that insofar as the plaintiff gave evidence to this court that his neck symptoms only persisted for a period of approximately six months or thereabouts after the accident in 2008, there is no concrete evidence that that was not correct.
18. Great stress was laid on the fact that the plaintiff had been referred by his GP to the Pain Clinic in 2014. However, it is important to note that that was not in relation to neck pain, but was in relation to ongoing lower back pain. The entry in the GP notes in respect of this referral was in the following terms:

"This man was in RTA a few years ago. He has ongoing back pain. Previous MRI scan about six years ago was normal. He still has a lot of back pain, recurrent though not referred and no neurological findings. Please can you review."
19. That referral letter was sent to Dr. Conroy at the Pain Clinic. The referral from the GP was acknowledged by the clinic by letter dated 16th May, 2014. The plaintiff received an appointment to be seen at the pain clinic at 08:40 hours on 13th April, 2015; however, he did not turn up for that appointment. The clinic wrote directly to the plaintiff and told him that he would have to contact his family doctor, who would refer him again to the clinic, if necessary. It appears that the GP did feel that such a referral was necessary because there is a letter on the file from the pain clinic dated 14th November, 2016, informing the plaintiff that he had failed to keep his appointment which had been scheduled for 08:30 hours on Monday, 14th November, 2016. He was again advised that he would have to contact his family doctor for a further referral, if deemed necessary.
20. Thus, the net position seems to be, that the plaintiff was referred by his GP for review at the pain clinic due to ongoing lower back pain. That referral was initially made in May 2014. It produced two appointments, one in 2015 and one in 2016, neither of which were kept by the plaintiff.

21. It appears that there must have been a third referral by the GP to the pain clinic, because it is common case that the plaintiff was eventually seen at the pain clinic and that a total of three injections were administered to his neck in the period 2017 to the end of 2021. The plaintiff gave evidence that he had received three such injections; that the treatment had been distressing for him to receive; but that it had not produced any lasting beneficial results for him. There is reference in Dr. Henry's reports to the giving of the injections.

Conclusions.

22. There are a number of features in this case which caused the court some concern. Firstly, there is the fact that the plaintiff had what would appear at first sight to be an open and shut case for an assessment of damages arising out of the first accident; yet when his action in relation to the injuries sustained in that accident was listed for hearing before the High Court in June 2016, he withdrew his action. When pressed on the reason why he had done so, he would only state that he had done that on the advice of his lawyers. In giving that answer, the plaintiff effectively brought down a steel curtain, because neither counsel, nor the court, could probe further having regard to the privilege attaching to the confidentiality of lawyer/client advice.
23. The court has tried to think of any credible reason why a plaintiff would elect to withdraw their proceedings for reasons other than that he had been detected in relation to fraudulent behaviour, either concerning the circumstances of the accident, or in relation to his account of his injuries. However, the court has not been able to come up with any credible reason why a person, who was a passenger in a vehicle that was involved in an accident, would withdraw their action. Accordingly, the court has to infer that the action was withdrawn because, the plaintiff had been found out to have been involved in some fraudulent activity, either concerning the staging of the accident, or concerning his account of his injuries.
24. The court is also concerned by virtue of the fact that the only medical witness who was called to give evidence on behalf of the plaintiff at the trial of the action, was Dr. Aideen Henry, who was retained directly by the plaintiff's solicitor. The practice of solicitors referring their clients directly to consultants for the purpose of drawing up medicolegal reports has been disapproved of in a number of decisions: see *Fogarty v Cox* [2017] IECA 309 (para. 43); *Dardis v Poplovka* (No 1) [2017] IEHC 149 (paras. 156 & 157) and *O'Connell v Martin* [2019] IEHC 571 (paras. 41 *et seq*).
25. The disadvantages of proceeding with the evidence of a reporting doctor, rather than a treating doctor, is evident from the present case. Dr. Henry operated on the basis of what she had been told by the plaintiff in relation to no previous neck injury, or complaints. Had she been treating the plaintiff as a patient on a referral from his GP, she would have received the normal referral letter from the GP, which would have set out the salient medical history of the patient being referred. This would have prevented Dr. Henry operating on the mistaken understanding that the plaintiff's neck had been asymptomatic prior to the 2017 accident. Furthermore, Dr. Henry did not have sight of the plaintiff's GP medical records. In this regard she was operating at a considerable disadvantage. Her

evidence, while given bona fide, was based on incorrect information as to the plaintiff's premorbid condition.

26. The court is also concerned by the fact that none of the plaintiff's treating doctors were called to give evidence. When a plaintiff is seeking damages in respect of injuries for which he has received treatment from various doctors, it is extraordinary that none of them are called as witnesses. In the course of the hearing, counsel for the plaintiff indicated that the plaintiff's solicitor had been unable to secure a response from the plaintiff's GP. When asked as to whether this was due to the fact that the plaintiff's GP had become unavailable for some reason, or had emigrated to a far off country, the court was informed that the plaintiff's GP continued to practice in Limerick city, but was apparently not willing to respond to correspondence or phone or email communication.
27. Where a party is desirous of calling a witness, the rules of court provide that that person can issue a subpoena to ensure the attendance of the relevant witness before the court. Thus, the court is satisfied that if the plaintiff had really wished to have his GP give evidence at the trial, that could have been secured, if necessary by the issuance of a subpoena.
28. The main treatment which the plaintiff has received, appears to be in the form of injection therapy to his neck. It appears that he has received three such injections after the date of this accident in January 2017, down to the end of 2021. However, in the absence of any evidence from Dr. Conroy, the court does not know why the injections were administered, what precise medication was administered through the injections and most importantly, the court does not know what is the opinion of the pain specialist in relation to the prognosis for the future. In these circumstances it is very difficult for the court to consider what some of money, if any, should be awarded to compensate the plaintiff for his injuries.
29. Turning to the issue under s. 26 of the 2004 Act, it is perhaps useful to set out the terms of s. 26, lest its precise terms should be lost in the mist of familiarity:

"26.—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—

(a) is false or misleading, in any material respect, and

(b) he or she knows to be false or misleading,

the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that—

(a) is false or misleading in any material respect, and

(b) *that he or she knew to be false or misleading when swearing the affidavit,*
dismiss the plaintiff's action unless, for reasons that the court shall state in its
decision, the dismissal of the action would result in injustice being done.

(3) *For the purposes of this section, an act is done dishonestly by a person if he or she*
does the act with the intention of misleading the court.

(4) *This section applies to personal injuries actions—*

(a) *brought on or after the commencement of this section, and*

(b) *pending on the date of such commencement.”*

30. In considering whether the plaintiff has acted in a way that is contrary to the provisions of s. 26, the court is of the view that this is confined to the actual evidence that is led by or on behalf of the plaintiff at the trial of the action. The court is not persuaded that in giving false information to a treating, or reporting doctor, a plaintiff necessarily transgresses the provisions of s. 26. The court is of the view that on the ordinary construction of the words used in the section, what is envisaged there is a situation where the plaintiff either gives false or misleading evidence himself, or he conspires with others to knowingly give false evidence on his behalf: see generally dicta of Irvine J. (as she then was) in *Platt v OBH Luxury Accommodation Ltd* [2017] IECA 221 at para. 65 *et seq.*
31. That is not to say that if it is established that the plaintiff has given false and misleading evidence to doctors, who have examined him for the purposes of the action, that that fact cannot be taken into account when considering the issue of damages and the recoverability of damages. However, the court is satisfied that if those circumstances were established in evidence, they would not of themselves constitute a breach of s. 26, because that section is concerned with the actual evidence that is given in the course of the hearing, or under subsection (2) where a false affidavit is sworn in relation to matters that are pleaded in the course of the action.
32. The court accepts the submission that was made by Mr. Tynan SC on behalf of the plaintiff, that in considering whether the plaintiff has in fact tried to mislead the court, it should have regard to the fact that the plaintiff voluntarily produced to the defendant, the pleadings and medical reports from the previous set of proceedings and his GP records for approximately four years prior to the date of the accident the subject matter of these proceedings. The court is satisfied that in so doing, the plaintiff was in fact approaching the proceedings with his cards "face up". He did not try to conceal relevant matters from the defendant or the court.
33. The court is satisfied that while his evidence to the court and indeed to various doctors was to the effect that the neck and back injury which he suffered after the first accident in 2008, only lasted for a relatively limited period, the court notes that he told Dr. Spillane that his back injury from the first accident had lasted for a number of years. Insofar as the plaintiff gave the impression that his neck complaints resolved completely within a

short period of the first accident, the court is satisfied that he was essentially telling the truth in that regard. There is no evidence of any ongoing neck complaints in the GP records. As already noted, there is only one episode of acute neck strain recorded in 2015. It did not appear to give rise to any ongoing medical treatment, other than a single prescription of analgesic medication.

34. In summary therefore, the court is satisfied from the MRI scans and the reports thereon, that the plaintiff had pre-existing degenerative changes in his cervical and lumbar spine. Such changes would be entirely consistent with his age. Both Dr. Henry and Dr. Spillane were essentially of the view that his pre-existing degenerative changes, which had probably been rendered symptomatic as a result of the first accident, were in all probability aggravated as a result of the injuries sustained in the accident in 2017. The court is satisfied that the plaintiff's neck had been essentially asymptomatic prior to the accident in 2017 and it appears that it was rendered symptomatic as a result of that accident, because the subsequent injection treatment administered by Dr. Conroy, has been solely to the neck.
35. In the absence of any evidence from the plaintiff's treating doctors, it is extraordinarily difficult for the court to attempt to assess damages in this case. The court has to have regard to the fact that the plaintiff himself is a poor historian. On occasions he has stated things that were untrue to various doctors. He told Dr. Tansey in October 2017, that the first accident in 2008, did not result in litigation or a personal injuries claim. That was quite untrue. However, in the course of these proceedings the plaintiff had disclosed those proceedings and had furnished a copy of them to the defendants' solicitor.
36. In stating to Dr. Henry that he had no other medical issues, other than that he had hurt his lower back in the accident in 2008 and had made a full recovery therefrom, the court is inclined to give the plaintiff the benefit of the doubt and hold that in giving that information to Dr. Henry, he was not actively trying to mislead her, but had in fact failed to see the significance of the neck injury following the 2008 accident, because it had only lasted for a relatively short period of time.
37. Doing the best that the court can to be fair to both parties, the court is satisfied of the following facts: the plaintiff was involved in a genuine RTA on 14th January, 2017. As a result of that accident, he suffered an exacerbation of the degenerative changes in his cervical and lumbar spine. His lower back had given him ongoing pain since the time of the first accident in 2008. His GP had made two referrals for him in respect of that injury to a pain clinic in 2014 and again at some date in 2015. Thus, the court is satisfied that the plaintiff's back was significantly symptomatic prior to the date of the accident the subject matter of these proceedings.
38. In relation to the plaintiff's neck, the court is satisfied that whatever injury he suffered to his neck as a result of the accident in 2008, that had only lasted for a relatively short period. The court reaches this conclusion due to the fact that, with the exception of the single episode of acute neck pain in 2015, there is no mention of neck symptoms in the plaintiff's GP records for the period 2012 to 2016.

39. Notwithstanding the absence of any evidence from the plaintiff's GP, or from Dr. Conroy, the court is satisfied that the plaintiff has received three injections to his neck from Dr. Conroy, or his team. Thus, the court is satisfied that it is appropriate to draw the inference that the pre-existing degenerative changes in the plaintiff's neck were exacerbated to a relatively significant degree as a result of the accident in January 2017. In the absence of evidence from the treating doctors, the court is unwilling to draw any inferences as to what the likely prognosis is.
40. The only evidence in this regard is the evidence of Dr. Henry and Dr. Spillane, that the plaintiff may suffer some aggravation of his pre-existing degenerative changes in the medium to long-term. The onus of proof rests on the plaintiff to establish on the balance of probabilities what the likely prognosis will be. Given that Dr. Henry was operating without the benefit of a referral letter from the plaintiff's GP, and without sight of the plaintiff's pre-accident medical records and was operating on the basis of misleading information from the plaintiff to the effect that the plaintiff had not suffered any injury or symptoms in his neck prior to the accident in 2017, the court cannot act on her opinion in relation to a prognosis in this case. Nevertheless, from the evidence of Dr. Spillane, the court is satisfied that the plaintiff will suffer some symptoms into the future.
41. Having considered all of the evidence both oral and documentary in this case, the court is of the view that it is fair to make an award of general damages for pain and suffering to date in the sum of €20,000, together with the sum of €10,000 for pain and suffering into the future. To that will be added the agreed special damages of €380; giving an overall award of €30,380 in favour of the plaintiff against the second named defendant.